

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID HARRISON,

Defendant-Appellant.

UNPUBLISHED

May 19, 2009

No. 279614

Wayne Circuit Court

LC No. 07-006798-01

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of transferring personal information with knowledge that it would be used to commit identity theft, MCL 445.67(b), and sentenced to three years' probation, with 90 days to be served in jail. He appeals as of right. We affirm.

Defendant was convicted of providing the names, Social Security numbers, and other personal information of three fellow Cass Tech High School employees to certain relatives, who used the information to open fraudulent credit card accounts.

I. Ineffective Assistance of Counsel

Defendant first argues that he is entitled to a new trial because defense counsel was ineffective. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* In this case, although defendant raised several of his ineffective assistance of counsel claims at a *Ginther*¹ hearing below, he did not argue that counsel was ineffective for failing to object to hearsay testimony or for failing to arrange for Antonio Fluckes to testify. Accordingly, review of these latter claims is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient under an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct was sound trial strategy and must further show that he was prejudiced by the error in question, i.e., he must show a reasonable probability that, but for counsel's error, the result of the trial would have been different. *Id.* at 312, 314; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant must also show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Where counsel's conduct involves a choice of strategies, it is not deficient. See *LaVearn*, *supra* at 216.

A. Failure to Object to Hearsay

Defendant argues that defense counsel was ineffective in failing to object to hearsay statements by defendant's relatives, Tracey Coleman and Antonio Fluckes, that defendant was the person who provided them payroll records containing personal information.

The decision whether to object to an impropriety is a matter of trial strategy. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). A failure to object can be a serious error that results in prejudice. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). However, an attorney is not ineffective for failing to make a futile objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Officer Jeffrey Williams did not initially testify to what Fluckes and Coleman told him. Rather, he testified to the results of the police investigation, which was not hearsay. Therefore, counsel was not ineffective for failing to object at that point. However, the officer subsequently stated that Fluckes and Coleman identified defendant as the source of the documents. That was an out-of-court statement offered for its truth and, accordingly, was hearsay under MRE 801(c). However, defense counsel may reasonably have chosen not to object because if the prosecutor had called Coleman or Fluckes to testify, they may have provided more damaging testimony against defendant. Thus, defendant has not overcome the presumption of sound trial strategy. Further, even if defense counsel acted unreasonably by failing to object, Harold Fluckes ("Harold") also identified defendant as the source of the documents,² and there was substantial circumstantial evidence supporting that theory. Therefore, defendant has not shown that he was prejudiced by counsel's failure to object.

B. Failure to Interview Fluckes and Call Him to Testify

Defendant argues that defense counsel was ineffective in failing to secure Antonio Fluckes's testimony, and in failing to object when the trial court stated that Fluckes had been present in court in violation of a sequestration order, which defendant maintains never existed. We disagree.

² Harold's preliminary examination testimony was read into the record because Harold did not appear at trial.

“Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Contrary to defendant’s argument, the record shows that there was a mutual sequestration order in place and that Fluckes arrived at the court with defendant. Moreover, neither Fluckes nor defendant informed defense counsel before trial that Fluckes wished to testify on defendant’s behalf. In addition, because personnel records were found in Fluckes’s house, Fluckes had been implicated in the identity theft scheme, and Fluckes had apparently identified defendant as the source of the documents, counsel had no reason to believe that he would be willing to testify or could even offer favorable testimony. Although Fluckes later approached defense counsel at trial and offered to testify, he subsequently changed his mind when he learned of the potential consequences of doing so. Under these circumstances, there is no basis for concluding that defense counsel acted unreasonably by failing to interview Fluckes or call Fluckes to testify at trial.

C. Failure to Request a Cautionary Instruction

Defendant argues that defense counsel was ineffective in failing to request a cautionary instruction concerning the dangers of accomplice testimony with respect to Harold’s immunized testimony. We again disagree.

Whether to request a cautionary instruction is a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003). Harold testified at defendant’s second preliminary examination under an agreement that he would not be prosecuted if he testified truthfully. However, there is no record support for defendant’s claim that Harold was defendant’s accomplice, as opposed to someone else’s accomplice. Further, defendant’s assertion that Harold was his accomplice is contrary to defendant’s claim that Harold was coerced into implicating defendant and had planned to change his testimony. We conclude that defense counsel was not ineffective in failing to request a cautionary instruction. Moreover, we cannot conclude that the outcome of the trial would have differed even if the cautionary instruction had been provided, especially given that the jury was informed that Harold had been granted immunity in exchange for his testimony.

D. Failure to Interview and Call Character Witnesses

Defendant argues that defense counsel was ineffective in failing to interview and present two character witnesses. The decision whether to call character witnesses was a matter of trial strategy. *Davis*, *supra* at 368.

Defense counsel reasonably may have decided that character witnesses would not be helpful because they did not have any personal knowledge of the facts of the case, and because their testimony would likely be devalued when the circumstances of the offenses were disclosed. Defendant has not overcome the presumption of sound strategy. Furthermore, we find no basis for concluding that the outcome of the trial would have been different if character witnesses had been called.

E. Failure to Challenge the Trial Court's Jurisdiction

Defendant also argues that counsel was ineffective in failing to challenge the trial court's jurisdiction based on an allegedly inappropriate transfer of the case for defendant's second preliminary examination. We disagree.

Defendant cites no authority for his claim that an improper reassignment deprives a subsequent trial court of jurisdiction. In any event, the record discloses that the original magistrate was unavailable at the time of defendant's second preliminary examination and that the officer in charge would have been unavailable when the original magistrate would be available again. Thus, there was good cause for reassigning the case to another magistrate. MCR 8.111(C). Accordingly, defense counsel was not ineffective in failing to file a motion to quash. The motion would have been futile.

F. Cumulative Effect of Errors

Defendant argues that the cumulative effect of counsel's errors deprived him of a fair trial.

"Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of errors may add up to error requiring reversal." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998), overruled on other grounds by *People v Miller*, 482 Mich 539 (2008). In this case, however, defendant has failed to show that defense counsel committed any serious errors. We therefore reject this claim of error.

II. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his convictions. We disagree.

We evaluate the sufficiency of the evidence by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268; 380 NW2d 11 (1985); see also *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The resolution of credibility disputes is within the exclusive province of the trier of fact, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), which may also draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

Defendant was convicted of violating MCL 445.67, which provides:

A person shall not do any of the following:

(a) Obtain or possess, or attempt to obtain or possess, personal identifying information of another person with the intent to use that information to commit identity theft or another crime.

(b) Sell or transfer, or attempt to sell or transfer, personal identifying information of another person if the person knows or has reason to know that the

specific intended recipient will use, attempt to use, or further transfer the information to another person for the purpose of committing identity theft or another crime.

(c) Falsify a police report of identity theft, or knowingly create, possess, or use a false police report of identity theft.

Defendant was charged under subsection (b) with transferring personal identifying information with knowledge, or reason to know, that it would be used for the purpose of identity theft.

The evidence at trial showed that defendant was employed as Cass Tech High School's "head store clerk," which gave him access to personnel records, including payroll records. Cass Tech High School payroll records were found at the home of defendant's relatives, Antonio Fluckes and Tracey Coleman, along with a notebook containing the names and Social Security numbers of approximately 100 current and former Cass Tech High School employees. Harold Fluckes testified that he observed defendant hand an envelope containing employee payroll information to another relative, Donzell Harper.³ Defendant's relatives used the information to obtain fraudulent credit cards.

Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a reasonable jury to find beyond a reasonable doubt that defendant transferred personal identifying information to various relatives, and that defendant knew or should have known that the relatives would use the information for the purpose of committing identity theft or other crimes. Although defendant contends that there are other reasonable explanations consistent with his innocence, the prosecutor was not required to negate every reasonable theory consistent with innocence, but was only required to prove the elements of the crimes beyond a reasonable doubt and convince the jury in the face of whatever contradictory evidence may have existed. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

³ We note that Harper later pleaded guilty to five counts of identity theft.